JIDDI JONED ENTERPRISE SDN BHD & ORS
v. LOUIS KH WONG & CO

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: W-02-975-05-2012]
29 MAY 2014

CONTRACT: *Misrepresentation – Sale and purchase of property – Letter confirming retention sum held by solicitor as stakeholder for real property gains tax – Solicitor subsequently denied deposit of retention sum by purchaser – Whether solicitor received retention sum from purchaser – Whether solicitor misrepresented on instruction of purchaser*

The vendors ('the appellants') entered into a sale and purchase agreement ('SPA') with the first defendant ('purchaser') in respect of a piece of land. The SPA provided, *inter alia*, that the appellants' solicitors to retain a sum ('retention sum') from the balance purchase price as stakeholder until the receipt of the certificate of clearance of the real property gains tax ('RPGT') of the said property. However, by letters between the appellants' solicitors and the purchaser's solicitors ('the respondent'), the appellants agreed to the purchaser's request that the retention sum be deposited with the respondent. The respondent subsequently confirmed, *via* a letter dated 5 November 1997, that the purchaser had deposited a sum of RM14,800,351.36, being the difference between the balance purchase price and the loan sum out of which RM4,148,836.56 had been set aside for the RPGT. However, when the appellants' solicitors sought the release of the retention sum upon receipt of the notice of assessment, the respondent replied that the assessment was premature as the sale had not been completed and requested that the payment of the RPGT be deferred. After repeated requests and demands for the release of the retention sum from the appellant's solicitors, the respondent, on 23 October 2002, informed the appellant's solicitors that the purchaser, having instructed the respondent to write the letter dated 5 November 1997 to the appellants, did not deposit the retention sum with the respondent. The appellants therefore commenced an action, *inter alia* (i) against the purchaser and the respondent for the release of the retention sum for RPGT; and (ii) alternatively for damages for misrepresentation against the respondent. The High Court, having found that the purchaser had failed to prove that they had made payment of the retention sum to the respondent, went on to hold the issue of whether the respondent had misrepresented the appellants could not hold water. Hence, the appeal by the appellants in respect of the alternative claim of damages for misrepresentation by the respondent that it had received the retention sum from the purchaser. The appellants submitted that based on the findings of the High Court that the payment had not been

made by the purchaser to the respondent, the respondent had misrepresented to the appellants' solicitors that it had received the retention sum from the purchaser.

Held (allowing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The High Court's finding that the retention sum claimed by the appellants was in effect part of the purchase price that remained unpaid by the purchaser to the appellants, was correct because if it was not part of the purchase price, the question of it being a retention sum in an SPA does not arise. It is retained by the purchaser to address the risk faced by the purchaser if the seller failed to pay the tax which by law is assessed upon the seller. (para 14)

(2) The High Court had erred in overlooking the fundamental fact that the claim for misrepresentation was a separate cause of action for which a claim was made for general damages to be assessed but no claim was made for specific losses that the respondent referred to. (paras 35 & 36)

(3) The evidence did not support the respondent's submission that the letter of 5 November 1997 was a joint effort between the purchaser and the appellants to cause Malaysian Building Society Bhd, the financial institution, to proceed with the release of the loan. The appellants were particularly concerned that the retention sum was deposited as they would face RPGT. The respondent's explanation to the appellants that it acted on the instruction of the purchaser came only on 23 October 2002, long after the event in 1997 and the first request for the release of the retention sum. If it was true, one would expect it to be made then, and not only on 23 October 2002. (para 38)

(4) The High Court overlooked the fact that the respondent had acted on the instructions of the purchaser and that the purchaser was extended a copy of the letters by the respondent pertaining to the issue between the purchaser and the respondent. However, it was not an answer to the appellants' claim against the respondent for misrepresentation as the evidence showed that while the respondent did not receive the retention sum, the respondent had, by the letter of 5 November 1997, represented to the appellants' solicitors that the purchaser had deposited the sum of RM14,800,351.36 with the respondent. (paras 45 & 46)

Bahasa Malaysia *Translation Of Headnotes*

Penjual-penjual ('perayu-perayu') memasuki perjanjian jual beli ('PJB') dengan defendan pertama ('pembeli') berkaitan dengan sebidang tanah. PJB tersebut memperuntukkan, antara lain, bahawa peguamcara perayu-perayu akan menahan suatu jumlah ('jumlah tahanan') daripada baki harga belian sebagai pemegang amanah sehingga penerimaan sijil kelulusan cukai keuntungan harta tanah ('CKHT') bagi hartanah tersebut. Walau

bagaimanapun, melalui surat-surat antara peguamcara perayu-perayu dan peguamcara pembeli ('responden'), perayu-perayu bersetuju dengan permintaan pembeli bahawa jumlah tahanan didepositkan dengan responden. Responden kemudiannya mengesahkan, melalui surat bertarikh 5 November 1997, bahawa pembeli telah mendepositkan sejumlah RM14,800,351.36, perbezaan antara baki harga belian dan jumlah pinjaman yang daripada jumlah tersebut RM4,148,836.56 telah diketepikan untuk CHKT. Walau bagaimanapun, apabila peguamcara perayu-perayu memohon pelepasan jumlah tahanan selepas menerima notis pentaksiran, responden menjawab bahawa pentaksiran tersebut adalah pra-matang kerana jualan belum dimuktamadkan dan meminta bahawa bayaran CKHT ditangguhkan. Selepas permintaan berkali-kali dan tuntutan untuk pelepasan jumlah tahanan daripada peguamcara perayu-perayu, responden, pada 23 Oktober 2002, memaklumkan kepada peguamcara perayu-perayu bahawa pembeli, selepas mengarahkan responden menulis surat bertarikh 5 November 1997 kepada perayu-perayu, tidak mendepositkan wang tahanan tersebut dengan responden. Perayu-perayu oleh itu memulakan tindakan, antara lain (i) terhadap pembeli dan responden bagi pelepasan jumlah tahanan untuk CKHT; dan (ii) secara alternatifnya untuk ganti rugi salah representasi terhadap responden. Mahkamah Tinggi, setelah mendapati bahawa pembeli gagal membuktikan bahawa mereka telah membuat bayaran wang tahanan kepada responden, selanjutnya telah memutuskan isu, sama ada responden telah membuat salah representasi kepada perayu-perayu, tidak boleh dipertahankan. Dengan itu rayuan oleh perayu-perayu berkaitan dengan tuntutan alternatif bagi ganti rugi terhadap salah representasi oleh responden bahawa ia telah menerima jumlah tahanan daripada pembeli. Perayu-perayu menghujahkan bahawa berdasarkan dapatan-dapatan Mahkamah Tinggi bahawa bayaran tidak dibuat oleh pembeli kepada responden, responden telah membuat salah representasi kepada peguamcara perayu-perayu bahawa ia telah menerima jumlah tahanan tersebut daripada pembeli.

Diputuskan (membenarkan rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Dapatan Mahkamah Tinggi bahawa jumlah tahanan yang dituntut oleh perayu-perayu adalah sebenarnya sebahagian harga belian yang kekal tidak dibayar oleh pembeli kepada perayu-perayu adalah betul kerana jika ia bukan sebahagian harga belian, persoalan bahawa ia adalah jumlah tahanan dalam PJB tidak akan timbul. Ia ditahan oleh pembeli untuk menghadapi risiko oleh pembeli jika penjual gagal membayar cukai yang mana ditaksir oleh undang-undang terhadap penjual.

(2) Mahkamah Tinggi telah terkhilaf apabila terlepas pandang fakta penting bahawa tuntutan untuk salah representasi adalah kausa tindakan yang berasingan yang mana tuntutan telah dibuat untuk ganti rugi am ditaksir tetapi tiada tuntutan dibuat untuk kerugian khusus yang dirujuk oleh responden.

(3) Keterangan tidak menyokong penghujahan responden bahawa surat bertarikh 5 November 1997 adalah usaha bersama antara pembeli dan perayu-perayu untuk membuatkan Malaysian Building Society Bhd, institusi kewangan, untuk meneruskan dengan pelepasan pinjaman. Perayu-perayu khususnya mementingkan bahawa wang tahanan didepositkan kerana mereka akan menghadapi CKHT. Penjelasan responden kepada perayu-perayu bahawa ia bertindak atas arahan pembeli hanya timbul pada 23 Oktober 2002, lama selepas kejadian pada 1997 dan permohonan pertama untuk pelepasan jumlah tahanan. Jika ia adalah benar, seseorang akan mengharapkan ia dibuat pada masa itu, dan bukan hanya pada 23 Oktober 2002.

(4) Mahkamah Tinggi terlepas pandang fakta bahawa responden telah bertindak atas arahan pembeli dan bahawa pembeli telah dilanjutkan sesalinan surat-surat oleh responden berkaitan dengan isu antara pembeli dan responden. Walau bagaimanapun, ia bukan jawapan kepada tuntutan perayu-perayu terhadap responden bagi salah representasi kerana keterangan menunjukkan bahawa walaupun responden tidak menerima wang tahanan, responden telah, melalui surat bertarikh 5 November 1997, merepresentasi kepada peguamcara perayu-perayu bahawa pembeli telah mendepositkan jumlah RM14,800,351.36 dengan responden.

Case(s) referred to:

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 72

Evidence Act 1950, s. 103

For the appellants – Deborah J Kaur; M/s Soraya Jabid Deborah & Co

For the respondent – Louis Wong Kok Heng (representing himself); M/s Louis KH Wong & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-1468-2002]

Reported by S Barathi

JUDGMENT

Abdul Wahab Patail JCA:

[1] In Civil Suit S1-22-1468-2002, commenced by the appellants, the High Court had:

(a) allowed the plaintiffs' claim against the first defendant Yeng Chong Realty Bhd (previously Yeng Chong Realty Sdn Bhd); but

(b) dismissed their claim against the second defendant Louis KH Wong & Co.

[2] The plaintiffs ("the appellants") appealed against the decision in respect of the second defendant ("the respondent") only.

[3] Having heard the parties, and given the nature of the subject matter, the defences and submissions, we adjourned the decision to a date to be fixed, to consider the submissions made and to prepare written grounds.

[4] The appellants were vendors, the first defendant and the respondent were the purchaser and the purchaser's solicitors respectively. The claim by the appellants were as follows:

(a) Against the first defendant and the respondent for the release of the retention sum for real property gains tax for the:

(i) First appellant RM1,705,154.89;

(ii) Second appellant RM975,441.81;

(iii) Third appellant RM702,761.80; and

(iv) Fourth appellant RM765,478.06, totalling RM4,148,836.56, totalling RM4,148,836.56, together with the tax increase of 10% as pleaded in the statement of claim and interest and costs.

(b) Alternatively against the respondent for damages for misrepresentation to be assessed and paid.

Preliminary Observation

[5] We observe that after para. 24 of the grounds of decision, the conclusion of the High Court was written as follows:

> For all the foregoing reasons on a balance of probabilities, the Court found that the Plaintiffs had proven their claim against the 1st Defendant but not against the 2nd Defendant and hence made the orders against the 1st and 2nd Defendants as per paragraphs 4.1 and 4.2 above.

[6] At para. 4.2, before proceeding to set out its reasons, the High Court had written:

> As for the 2nd Defendant, on a balance of probabilities the Court found the Plaintiffs had not proven their claim against the 2nd Defendant and the claim is dismissed with costs to be taxed unless otherwise agreed.

[7] We understand the above not to mean that on a balance of probabilities the High Court found, but that the High Court certainly found the plaintiffs had proved their claim against the first defendant upon a balance of probabilities, but failed to do so against the second defendant.

[8] An appellant seeks to overturn the decision of the trial court by showing where the trial court had erred, while the respondent defends the decision on the basis the trial court did not err or if it did, the error is immaterial. Section 72 of the Courts of Judicature Act 1964 ("Act 91") provides as to immaterial errors as follows:

A 72. Immaterial Errors

No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal, nor a new trial ordered by the Court of Appeal, on account of any error, defect, or irregularity, whether in the decision or otherwise, not affecting the merits or the jurisdiction of the Court.

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[9] We proceed to examine the grounds of decision appealed upon, before proceeding to consider the errors raised thereon.

The Grounds Of Decision Of The High Court

C **[10]** The summation of the claim, the respective defences and the issues adequately summed up the matter before the High Court. We reproduce these below.

[11] The High Court summed up the appellants' claim at para. 1 of its grounds of decision as follows:

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1. Essentially the Plaintiffs' claim against the 1st and 2nd Defendants are for:

(a) the Retention Sum for Real Property Gains Tax (RPGT) in the cumulative sum of RM4,148,836.56, comprising (i) 1st Plaintiff's claim of RM1,705,154.89, the 2nd Plaintiff's claim of RM975,441.80, the 3rd Plaintiff's claim of RM702,761.80 and

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the 4th Plaintiff's claim of RM765,478.06;

(b) an additional 10% tax increase payable on unpaid RPGT on the above sums in the cumulative sum of RM414,883.66 comprising (i) the 1st Plaintiff's claim of RM170,515.49, (ii) the 2nd Plaintiff's claim is RM97,544.18, (iii) the 3rd Plaintiff's claim of

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RM70,276.18, and (iv) the 4th Plaintiff's claim of RM76,547.81;

(c) interest of 8% p.a. on the sum of RM4,148,836.56 from 22.9.1997 till date of judgment;

(d) post-judgment interest on the RM4,148,836.56 and RM414,883.66 from the date of judgment to the date of full settlement; and

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(e) costs.

1.1 Additionally, the Plaintiff (*sic*) claims for damages against the 2nd Defendant for misrepresentation with interest and costs thereon.

[12] Paragraphs 2 and 3 of the grounds of decision set out the respective

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defences as follows:

2. Essentially the 1st Defendant's defence is:

(a) that the 1st Defendant has deposited with the 2nd Defendant the full purchase price as stakeholders and as such alleges it has

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fulfilled its obligation (paragraph 15 and 20 of Statement of Defence);

(b) the 1st Defendant was and is under no duty to ensure that the Plaintiffs receive the money from the stakeholder (para 19 Statement of Defence);

(c) the 1st Defendant avers that the 1st Defendant deposited the Retention Sum with the 2nd Defendant and that it is affirmed by the 2nd Defendant in its letter of undertaking dated 5.11.1997 ...

3. Essentially the 2nd Defendant's defence is:

(a) the sum of RM4,148,836.56 was not deposited by the 1st Defendant to the 2nd Defendant;

(b) the 1st Defendant requested the 2nd Defendant to issue the letter dated 5.11.1997 (Exh. P18 Bundle C2 p. 355) and the 1st Defendant informed the 2nd Defendant that the Plaintiffs were agreeable to the Retention Sum to be retained by the Defendants and that it is not necessary for the 1st Defendant to deposit the said sums with the 2nd Defendant;

(c) the 2nd Defendant pleaded fraud and conspiracy between the Plaintiffs and the 1st Defendant to defraud Malaysian Building society Bhd.

However in respect of (c), this was not proven by the 2nd Defendant or the 1st Defendant at all.

[13] The issues before the court were set out at para. 10:

Issues

10. (a) Whether the Retention Sum of RM4,148,836.56 was paid by the 1st Defendant to the 2nd Defendant?;

(b) Whether the 1st Defendant has deposited with 2nd Defendant the full purchase price as stakeholders and as such it has fulfilled its contractual obligation?; and

(c) Whether the 2nd Defendant is liable to the Plaintiffs on the ground of misrepresentation?

[14] At para. 11, the High Court began with addressing the question whether the retention sum of RM4,148,836.56 was paid by the first defendant to the second defendant? The High Court addressed the contention that balance purchase price and retention sums are separate. Holding that this is not part of the pleaded case, the High Court found that the retention sum of RM4,148,836.56 claimed by the plaintiffs was in effect part of the balance purchase price that remains unpaid by the first defendant to the plaintiffs respectively. In our view, that is correct because if it is not part of the purchase price, the question of it being a retention sum in a sale and purchase agreement does not arise. It is retained by the purchaser to address the risk faced by the purchaser if the seller fails to pay the tax which by law is assessed upon the seller. We think that part of the trial, and consequent dealing with it in the grounds of decision was a waste of time. The High Court concluded at para. 13.3 with what, leaving aside that the memorandum of transfer had been signed and submitted for assessment of real property gains tax, is plainly obvious, that "until the full balance purchase price which

includes the retention sum of RM4,148,836.56 retained for the payment of real property gains tax is paid, the first defendant had not fulfilled their contractual obligations and the sale and purchase cannot be deemed to be completed".

[15] Without addressing and making a finding on the question whether the retention sum was deposited by the first defendant with the respondent, the High Court went on to the appointment of the respondent as stakeholder. Though the parties had originally agreed the retention sum be held by the appellants' solicitors as stakeholders, subsequent agreement as evidenced by the letters dated 17 September 1997 and 24 September 1997 (RR7:1347 & RR7:1348) between the appellants' solicitors and the respondent showed that the appellants had agreed to the first defendant's request that the retention sum be deposited with the first defendant's solicitors. The High Court referred to *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116, a case on accountability under a fiduciary duty of a person receiving any money for either or both parties in a sale and purchase transaction. The High Court concluded at para. 15.2:

> Based on the evidence, I agreed that the 2nd Defendant was appointed by the 1st Defendant and the Plaintiffs had no objections to the 1st Defendant's request. Thus I agreed with the Plaintiffs' Counsel that the contention of the 1st Defendant that it was not disputed that DW2 (the 2nd Defendant) was appointed jointly by both the Plaintiffs and the 1st Defendant as stakeholder for the RGPT is misconceived.

[16] The High Court went on, to the subject of when a person is a stakeholder, to address the submission for the appellant that the respondent becomes a stakeholder only when the retention sum is deposited with him.

[17] The point is, in our view, a waste of time. It could have been explained simply that since by cl. 16.2 of the sale and purchase the vendors who were entitled to receive the payment, agreed that the retention sums, which was to be retained by the purchaser, to be held by the vendors' solicitors, the subsequent agreement served only to amend that part of cl. 16.2.

[18] Then the High Court returned to the consideration of whether the first defendant deposited the retention sum with the respondent. The first defendant had pleaded in its defence as follows:

> 15. With reference to paragraph 13 of the Statement of Claim, the First Defendant reiterates and avers that at all material times the First Defendant with the Second Defendant as a stakeholder the full purchase price and has thus adequately and sufficiently fulfilled all his obligations under the respective Agreement.

[19] Holding that the burden of proof of that assertion of fact in para. 15 lay on the first defendant, the High Court found, citing s. 103 Evidence Act, *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ

86 (FC), *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627, the first defendant had failed to prove upon a balance of probabilities that it had paid the retention sum to the respondent. That led to the decision that sale and purchase was not completed and the order that the first defendant to pay the same as claimed by the appellants. The claim against the respondent was dismissed since with the first defendant failing to prove it had deposited the sum with the respondent, the conclusion is that the respondent had not received the sum that was to be deposited with him to be held as stakeholder.

[20] Having so concluded, the High Court went on to consider the question whether the respondent herein is responsible to the appellants herein on the ground of misrepresentation. The dismissal of this part of the appellants' claim is the subject of the present appeal.

[21] The High Court summarised the facts and evidence and reasoned as follows:

> 20. The Plaintiffs submitted that the 2nd Defendant by a series of the following letters induced the Plaintiffs to believe and the Plaintiffs relied on the representation by the 2nd Defendant that the monies were deposited by the 1st Defendant with the 2nd Defendant and the Memorandum of Transfers were executed by the Plaintiffs. The said letters are:
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> (a) By letter dated 5.11.1997, P18 the 2nd Defendant informed them that on the 22nd September the 1st Defendant had deposited the sum of RM14,800,351.36 being the difference between the balance of the purchase price and the loan sum and that the sum of RM4,148,836.28 was set aside for the retention of the RPGT.
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> (b) Then the Plaintiffs' solicitors, by their letter dated 5.11.1997, confirmed what the Plaintiffs' solicitors were informed by telephone. Further, in the said letter which is 5.11.1997, the Plaintiffs' said solicitors requested for information (Exh. P19, Bundle C2 pp. 356-357).
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> (c) Then the 2nd Defendant, by letter dated 5.11.1997, clarified the sums (exh. P30, Bundle C3 p. 423).
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> (d) The Plaintiffs' said solicitors received a copy of a letter dated 6.11.1997, that was sent by the 2nd Defendant to the solicitors for Malaysian Building Society Berhad stating that the sum of RM4,148,836.28 was deposited with the 2nd Defendant (Exh. P20, Bundle C2 p. 358).
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> (e) The Plaintiffs' solicitors by letter dated 6.2.1998 to the 2nd Defendant informed that the Notice of Assessment had been received and requested for the release of the said sum to Kumpulan Emas Berhad for payment of RPGT (Exh. P21, Bundle B p. 359).

(f) Then the 2nd Defendant, by letter dated 11.2.1998 (Exh. P22, Bundle C3 p. 424), stated that the assessment was premature as the sale had not been completed and requested that the payment of the RPGT was to be deferred.

(g) The Plaintiffs' said solicitors, by letter dated 13.2.1998 to the 2nd Defendant, again requested for the release of the retention sum (Exh. P23, Bundle C2 p. 360).

(h) The Plaintiffs' solicitors, by letter dated 2.9.2002, requested for the said sums (Exh. P25 Bundle C3 p. 428)

(i) The Plaintiffs' solicitors, by letter dated 22.10.2002 to the 2nd Defendant, demanded for the release of the monies (exh. P26, Bundle C3 p. 362).

21. As far as the 2nd Defendant is concerned, there is no misrepresentation as such because he explained by letter dated 23.10.2002 (Exh. P27, Bundle C2 p. 363) the 2nd Defendant informed the Plaintiffs that after having being instructed to write the letter dated 5.11.1997 i.e. P18 the 1st Defendant did not deposit the sums of monies with the 2nd Defendant. Further, to reiterate the 2nd Defendant in his Statutory Declaration, his police report (Exh. P49 Bundle C2 p. 411), his Affidavit affirmed on 8.7.2003 (Exh. P50 Bundle C3 pp. 436-437), his Witness Statement and his oral testimony stated that the monies were never deposited by the 1st Defendant with the 2nd Defendant.

22. It is significant to observe that the 1st Defendant was carbon copied by the 2nd Defendant letters which occurred before the death of the director of Yeng Chong Realty Bhd, Lee Sung Yong. Namely, letter dated 6.11.1997 (Exh. P20, Bundle C2 p. 358) and letter dated 11.2.1998 (Exh. P22, Bundle C3 p. 424) alluded to in paragraph 21(d) and (f) above.

22.1 These contemporaneous documents prior to 1999 show categorically that the 1st Defendant are aware of the goings on regarding the sale and purchase transaction and the request of the Plaintiffs' solicitors by letter dated 6.2.1998 (Exh. P21, Bundle B p. 359) and 13.2.1998 (Exh. P23, Bundle C2 p. 360) to the 2nd Defendant for the release of the retention sum.

22.2 In this regard, I adopt what I had stated earlier regarding the burden of proof being on the 1st Defendant to show that the payment of the Retention Sum was deposited by the 1st Defendant with the 2nd Defendant referred to in paragraphs 18 and 19 above.

23. In any event the Plaintiffs in submission (paragraph 9 of the Plaintiffs' Submission in Reply to the 2nd Defendant's Submission) stated

However in the event this ... Court finds that there is no evidence ... to show that the First Defendant did deposit with the Second Defendant the sum for the retention sum than (*sic*) the First Defendant is still holding the said sum that remains unpaid.

24. Thus having made a finding that the 1st Defendant has failed to prove that they had made payment of the Retention Sum to the Defendant, the issue of whether the 2nd Defendant has misrepresented the Plaintiffs cannot hold water. The Plaintiffs cannot have their cake and eat it as well.

The Appeal

[22] The notice of appeal stated itself to be an appeal against the whole decision and the memorandum of appeal unequivocally stated in para. 1 thereof that:

> The Learned Judge erred in law and fact in dismissing the Appellants' claim or the Appellant's alternative claim against the Respondent with costs to be taxed.

[23] The written submissions for the appellants however concluded as follows:

42. The Appellant submits that based on the findings of the Honourable Judge and the fact that payment has not been made by the 1st Defendant to the Respondent, the Respondent has misrepresented to the Appellants' solicitors.

43. By reason of the above the alternative claim of the Appellant against the Respondent ought to have been allowed.

44. Pursuant to the above the damages for the misrepresentation ought to be assessed by the High Court.

45. Wherefore the Appellants pray that the Appellants' appeal against the Respondent be allowed with costs.

[24] In her oral submission, counsel for the appellants began with informing this court that the appeal was in respect of the alternative claim of damages for misrepresentation by the respondent by letter dated 5 November 1997 (RR7:1349) that it had received the retention sum from the first defendant:

> We refer to the above matter and write to confirm that our client has on 22nd September, 1997 deposited with us the sum of RM14,800,351.36 being the difference between the balance of the purchase price and the loan sum. Please be informed that out of the said sum of RM14,800,351.36 a sum of RM4,148,836.28 has been set aside for the retention of the Property Gains Tax and has been deposited under interest bearing account.

[25] We set out below the contemporaneous documentary evidence with regard to the claim for misrepresentation below. We observe that the tedium of doing so overcomes the attempts in obfuscation in submissions, argument and even positions taken without the support of even thin ice, as it replays events in the sequence that they unfolded:

(a) On 23 April 1997, each appellant as vendor, and the first defendant as purchaser, entered into a sale and purchase agreement in respect of land in Mukim Ayer Panas, Daerah Jasin, Negeri Melaka. Clause 16.2 of

each agreement authorised the appellants' solicitors to retain from the balance purchase price the retention sum and to hold the same as stakeholders:

> 16.2 The Vendor hereby covenants and agrees that the Vendor's Solicitors be hereby authorised to retain from the Balance Purchase Price the sum stated in Section 11 of the Schedule hereto ("the Retention Sum") as stakeholders until receipt of the certificate of clearance of the real property gains tax of the said Property from the said Director-General.

(b) As evidenced by letters 17 September 1997 and 24 September 1997 (RR7:1347 & RR7:1348) between the appellant's solicitors and the respondent, the appellant agreed to the first defendant's request that the retention sum be deposited with the first defendant's solicitors.

(c) On the same day 5 November 1997, the appellants' solicitors had written (RR7:1350) as follows:

> We refer to the above matter and to the telephone conversation between your Mr Foo and our Ms. Jennifer Teo this morning.
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> This serves to confirm the following:
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> 1. Your client has deposited the differential sum of RM14,800,351.36 (including the retention sum of RM8,661,130.63) with you as Stakeholders on the Completion Date which is 22nd September 1997.
> 2. The said differential sum has been placed in an interest bearing account since the Completion Date. Please be reminded that the interest accrued is held on trust for our clients and our clients are entitled to the same.
> 3. Our clients have agreed to extend the Completion Date to 7th November 1997 Provided That your client shall pay our clients late payment interest on the outstanding sum of RM141,100,000.00 ("said Sum") at the rate of Ten Per Centum (10%) per annum on a daily rest basis until full payment of the said Sum together with the late payment interest by 7th November 1997.
> 4. The late payment interest due is RM 1,778,246.58 which is calculated as follows:
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> 22nd September to 7th November = 46 days
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> RM141,100,000 X 10% X 46/365 = RM1,778,246.575.

(d) The respondent wrote on 5 November 1997 to the appellants' solicitors (RR7:1349):

> We refer to the above matter and write to confirm that our client has on 22nd September, 1997 deposited with us the sum of RM14,800,351.36 being the difference between the balance of the purchase price and the loan sum.

> Please be informed that out of the said sum of RM14,800,351.36 a sum of RM4,148,836.28 has been set aside for the retention of the Property Gains Tax and has been deposited under interest bearing account.

(e) A further letter 5 November 1997 was written by the appellants' solicitors (RR7:1364) seeking clarification:

> We refer to your letter dated 5th November 1997. Kindly confirm that the total sum of RM14,800,351.36 being the difference between the balance of the purchase price and the loan sum has been deposited under interest bearing account on 22nd September 1997, as we are unsure of the paragraph 2 of your above said letter.

(f) The next day 6 November 1997 (RR7:1352) the respondent wrote to M/s KC Yap Kamaludin & Partners:

> We refer to this afternoon tele-conversation between your Mr Tham and our Mr Foo and hereby write to confirm that we undertake make up the difference by utilising the sum of RM4,148,836.28 presently deposited with us for the redemption sum payable to Arab-Malaysian Merchant Bank Berhad.

(g) On 6 February 1998, the appellants solicitors sought from the respondent release of the retention sum of RM4,148,836.28 together with the interest accrued thereon and made payable to Kumpulan Emas Berhad. The respondent was informed a notice of assessment dated 24 January 1998 from the Inland Revenue Department had been received and payment was to be made on or before 24 February 1998.

(h) The respondent replied on 11 February 1998:

> We refer to your letter of 6th instant and in particular to the Notice of Payment of RPGT for Jiddi Joned Enterprise Sdn. Bhd.
>
> Our client instructed us that the said Notice issued by Jabatan Basil Dalam Negeri is premature as the Sale and Purchase Agreement has not been completed in view that the Title to the said Land has not been issued by the relevant Land Office. As such, kindly request your client and/or its Tax Consultant to inform Jabatan Hasil, accordingly to defer payment of the RPGT until our confirmation that the Sale and Purchase Agreement has completed.

(i) On 13 February 1998, the appellants' solicitors repeated the request to release the retention sum to pay the assessment of real property gains tax, and the release to the appellants of RM3,583,950.65 before 20 February 1998 failing which his client shall be liable for all penalties, expenses, costs and/or damages incurred or suffered by the appellants.

(j) The sums were not released and on 2 September 2002 the appellants' solicitors wrote:

> We refer to the above matter and your letters to us both dated 5th November 1997 (copies are enclosed herewith) confirming that you have deposited the retention sum of RM4,148,836.28 into an interest bearing account on 22nd September 1997.
>
> We would be grateful if you could kindly confirm to us the amount together with interest standing on the said account as at to date. Further, as real property gains tax has been assessed on the disposal of the Properties as have been notified by us to you in our previous letters to you enclosing the said assessments, kindly revert to us on how you propose to settle the same with the retention sum together with interest accrued thereon.

(k) This was followed up on 22 October 2002 with a demand for the release of the retention sum together with full particulars on the interest computation.

(l) The reply from the respondent dated 23 October 2002 is as follows:

> We wish to refer to your letter dated 22nd October, 2002. After having instructed us to write the said letter dated 5th November 1997, our client, the Purchaser of the abovesaid Properties did not deposit with us the sum of RM14,800,351.36 for payment to your client. So, there is no RM14,800,351.36 (inclusive of RM4.148,835.28) to be released to your client or to you as their Solicitors.

[26] Thus prepared, we proceeded to examine the respondent's defence, submissions in the High Court, and the submissions now before us.

The Defence And Submissions For The Respondent

[27] Mr Louis Wong Kok Heng appeared on behalf of Louis KH Wong & Co, of which he was the sole proprietor. Given the submission made, we think it best to address our consideration of it in detail.

[28] No summary could be adequate to present the defence as pleaded. Not wanting to risk any shortcoming in a summation, we reproduce this as follows:

1. Defendan2 tidak mempunyai apa2 pengetahuan mengenai Perenggan 1 Penyataan Tuntutan.
2. Defendan2 mengakui perenggan 3 Penyataan Tuntutan dan menyatakan bahawa Tetuan Azman Davidson & Co. ("Peguam tersebut") adalah, pada setiap masa yang material, firma peguam yang mewakili Plaintif2 didalam transaksi jual-beli "Hartanah tersebut".
3. "Peguam tersebut"/Plaintif2 adalah negligent di dalam transaksi jualbeli.
4. Butir2 kecuaian "Peguam tersebut"
    a) "Peguam tersebut" tidak menyimpankan sebahagian Harga pembelian bagi CKHT.

b) "Peguam tersebut" telah berlebih-lebihan membayarkan wang dari Harga pembelian kepada Plaintif2.

c) "Peguam" tersebut menyalahnasihkan (*sic*) Plaintif2 membenarkan defendan-defendan menyimpankan RM14,800,351.36 (termasuk RM 4,148,836.56).

5. "Peguam tersebut" dimintalah janji sebagai Pemegang pertaruhan CKHT mengikuti SPA tersebut.

6. Oleh sebab itu Plaintif2 telah mungkir SPA tersebut apabila mereka membenarkan defendan-defendan menjadi Pemegang pertaruhan.

7. Oleh sebab perenggan 6 diatas, Plaintif2 telah menyubahatkan dengan Defendan1 menipukan Malaysia Building Society Berhad melepaskan pinjaman tersebut kepada Defendan1 bagi pembelian Harta tersebut.

8. "Peguam tersebut" adalah bertanggungjawab menyimpankan baki harga belian dan menahankan jumlah2 yang dinyatakan di dalam seksyen 11 jadual kepada SPA sebagai Pemegang pertaruhan sehingga penerimaan sijil2 perlepasan cukai keuntungan Harta tanah ('CKHT') untuk Hartanah tersebut daripada Ketua Pengarah Lembaga Hasil Dalam Negeri.

9. "Peguam tersebut" adalah tidak menyimpankan baki harga pembelian tersebut dan tidak menahankan jumlah2 yang dinyatakan/diperuntukkan didalam Seksyen 11 jadual kepada SPA.

10. Mengikuti yang disebutkan didalam perenggan? Penyataan Tuntutan, CKHT berjumlah RM8,661,130.63 mestilah ditahankan/disimpankan oleh "Peguam tersebut" untuk CKHT tetapi "Peguam tersebut" mungkir menahankan/menyimpankan wang tersebut itu.

11. Defendan2 mengakui perenggan? Penyataan Tuntutan dan mengatakan bahawa "Peguam tersebut" bertanggungjawab menahankan RM8,661,130.63 itu tetapi "Peguam tersebut" telah membayarkan wang itu kepada Plaintif2.

12. Merujuk kepada perenggan 8 Pernyataan Tuntutan, walaupun Plaintif2 menyetujui permintaan defendan-defendan, Plaintif2 tidak membayarkan RM4,512,294.35 (RM8,661,130.63 - RM4,148,836.28 = RM4,512,294.35) mereka kepada Defendan2 atau "Peguam tersebut" bagi CKHT yang Plaintif2 menyetujui membayarkan/mendepositkan kepada mereka sebagai pemegang pertaruhan.

13. Oleh sebab itu Defendan1 tidak membayarkan RM4,148,836.28 kepada Defendan2 walaupun telah mengarahkan Defendan2 menuliskan "Surat tersebut" kepada "Peguam tersebut."

14. Kedua-dua Plaintif2 dan Defendan1 bersetujui bahawa Plaintif2 kepada "Peguam tersebut dan Defendan1 tidak perlu membayarkan wang CKHT kepada Defendan2 tidak membayarkan RM14,800,351.36 (termasuk RM4,148,836.28) kepada Defendan2.

15. Oleh sebab perenggan 14 diatas kedua-dua Plaintif2 dan Defendan1 telah menipu MBSB untuk melepaskan/mengeluarkan Pinjaman tersebut kepada Defendan1 bagi Plaintif2 untuk membelikan Hartanah tersebut.

16. Oleh sebab perenggan 15 diatas, kedua-dua Plaintif2 dan Defendanl telah menipu Defendan2 menuliskan "Surat tersebut walaupun Defendan1 tidak membayarkan RM14,800,351.36 (termasuk RM4,148,836.28) kepada Defendan2.

17. Oleh sebab diatas Defendan2 adalah tidak menipu Plaintif2, "e contra" Plaintif2 dengan/melalui Defendan1 telah menipu Defendan2 menulis "Surat tersebut" kepada "Peguam tersebut". Butir2 "Fraud" Plaintif2/"JTLH"/"FTK".

(a) Defendan1 dengan seorang bernama Foo Tiang Kuang (selepas ini, dirujukan (*sic*) "FTK" tersebut) menipukan Defendan2 menandatangani "Surat tersebut".

(b) "FTK" tersebut itu adalah dinasihatkan oleh seorang lain bernama Jennifer Teo Li Hwee (selepas in dirujukan "JTLH" tersebut) seorang Peguam dari "Peguam tersebut" untuk mendapatkan "Surat tersebut."

(c) Plaintif2 bersama-sama "JTLH" tersebut menipukan Defendan2 menandatangani "Surat tersebut"

(d) Kakitangan Defendan2 adalah diarahkan jangan kirimkan/keluarkan "Surat tersebut" tetapi tidak berapa minit "Surat tersebut" telah dikirimkan/dikeluarkan oleh "FTK tersebut"

(e) Plaintif2 memerlukan "Surat tersebut" untuk mendapatkan Jumlah penebusan pinjaman bank yang berjumlah RM151,?51,515.08.

(f) "JTLH" dengan penuh tahu "FTK" adalah bukan Peguamcara.

18. Merujuk kepada perenggan 9 Penyataan Tuntutan, Defendan1 tidak mendepositkan jumlah perbezaan (diantara baki harga belian dan jumlah pinjaman) sebanyak RM14,800,351.36 (termasuk jumlah yang ditahan sebanyak RM8,661,130.63) dengan Defendan2 sebagai Pemegang pertaruhan.

19. Bertahun-tahun "Peguam tersebut", Plaintif2, dan/atau Defendan1 adalah tidak meminta jumlah wang RM14,800,351.36 (termasuk RM4,148,836.56) dibayarkan/dikembalikan kepada mereka. Kenapa? Kerana ketiga-tiga pihak ini tahu wang itu tidak didepositkan dengan Defendan2.

20. Defendan2 menafikan perenggan 10 Penyataan Tuntutan.

21. Mengenai perenggan 10 Pernyataan Tuntutan, Defendan2 tiada "Privity of "contract" dengan Plaintif2.

22. Representasi dan pengesahan yang dibuat bukan dibuat Defendan2.

23. Siapa yang buat representasi/pengesahan itu ialah Defendan1. bukan Defendan2; Defendan2 mewakili Defendant dalam perkara "Conveyancing" sahaja; Hartanah tersebut dijual atau tidak,

Defendan2 tidak peduli; Plaintif2 menyempurnakan jualbeli Hartanah tersebut, Defendan2 tidak peduli juga.

24. Mengenai perenggan 23 diatas, selanjutnya adalah Defendan1 yang mengarahkan Defendan2 menuliskan "Surat tersebut" kepada "Peguam tersebut" dengan tidak membertahu (*sic*) maksudnya kepada Defendan2.

25. Mengenai perenggan 13 Penyataan Tuntutan, adalah Plaintif2 mengatakan bohong. Sebenarnya Plaintif2 membenarkan defendan-defendan menahankan Jumlah Ditahan kerana "Peguam tersebut" tidak mahu/hendak menahan Jumlah itu.

26. Oleh sebab Plaintif2 membenarkan defendan-defendan menahankan Jumlah Ditahan, Defendan1 tidak mendepositkan Jumlah Ditahan dengan Defendan2 selepas mengarahkan Defendan2 menghantarkan "Surat tersebut" kepada "Peguam tersebut".

27. Mengenai perenggan 16 Penyataan Tuntutan, oleh sebab Defendan1 tidak mendepositkan Jumlah Ditahan dengan Defendan2, Defendan2 tidak ada Jumlah Ditahan dibayarkan kepada Plaintif2.

28. Mengenai perenggan 16 Penyataan Tuntutan, oleh sebab Defendan1 tidak mendepositkan Jumlah Ditahan dengan Defendan2, Defendan2 tidak ada Jumlah Ditahan dibayarkan kepada Plaintif2.

29. Oleh yang demikian Plaintif2 berhak menuntut gantirugi dari "Peguam tersebut" kerana "Peguam tersebut" tidak mahu/hendak Jumlah Ditahan didepositkan dengan mereka sendiri; Plaintif2 tidak berhak menuntut gantirugi dari Defendan2 yang mewakili Defendan1 yang kepadanya sahaja, Defendan2 bertanggungjawab.

30. Mengenai lagi perenggan 16 Penyataan Tuntutan, Defendan2 adalah tidak memungkiri terma2 SPA kerana Defendan2 tidak ada "Privity of Contract" dengan Plaintif2 didalam SPA itu.

31. Defendan2 menafikan perenggan 1 - Penyataan Tuntutan.

32. Akibat daripada kemungkiran dan kegagalan Plaintif2 dan/atau "Peguam tersebut", RM8,0127292.15 CKHT yang ditaksirkan, tidak dibayarkan dalam jangkamasa 30 hari dari tarikh penyampaian notis2 taksiran yang diwajibkan dibawah undang2 mesti dibayarkan oleh penjual Hartanah tersebut,

33. Mengenai Perenggan 18 Penyataan Tuntutan, Defendan1 tidak mendepositkan RM14,800,351.36 (termasuk RM8,012,292.15) dengan Defendan2 untuk dibayarkan kepada Plaintif2. Jadi, walaupun adalah Plaintif2 telah menuntut Jumlah Ditahan dilepaskan, Defendan2 tak ada RM8,012,292.15 tersebut itu dilepaskan kepada Plaintif2.

34. Selanjut (*sic*) kepada Perenggan 18 Penyataan Tuntutan diatas. Defendan1 tidak menyuruhkan Defendan2 melepaskan RM8,012,292.15 tersebut kepada Plaintif2 apabila Plaintif2 menuntut Jumlah Ditahan dari mereka (Defendan1). Jadi, adalah Defendan1 tidak

mendepositkan RM14,800,351.36 (termasuk RM 8,012,299.15) dengan Defendan2; kalau ada tentulah Defendan1 menyuruhkan Defendan2 melepaskan Jumlah Ditahan itu kepada Plaintif2.

35. Mengenai Perenggan 20 Penyataan Tuntutan representasi yang dibuat oleh Defendan2 didalam surat2 bertarikh 5.11.1997 tersebut diatas tidak palsu dan Defendan2 tidak membuat representasi secara salah dan secara "fraud" oleh sebab2 tersebut diatas.

36. Butir2 menunjukkan Defendan2 tiada "fraud"

(a) Pada masa Defendan1 mengarahkan Defendan2 menuliskan Surat tersebut", Defendan1 memberitahu Defendan2 bahawa adalah Plaintif2 bersetujui Jumlah Ditahan tersebut dipertahankan oleh defendan-defendan dan bahawa adalah tak perlu Defendan1 mendepositkan RM14,800,351.36 (termasuk RM4,148,136.28) dengan Defendan2.

(b) Plaintif2 tahu Defendan1 tidak mendepositkan Jumlah Pertahanan dengan Defendan2.

(c) Plaintif2 tahu Defendan1 tidak ada Jumlah Ditahan itu untuk didepositkan dengan Defendan2.

(d) Plaintif2 sendiri pun tidak ada wang bagi pembayaran CKHT yang mesti ditahankan oleh "Peguam tersebut"

(e) Jadi, Plaintif2 tidak mendepositkan wang CKHT sebanyak RM4,512,294.35 dengan "Peguam tersebut".

(f) Defendan1, dengan pengetahuan, perjanjian, dan izin Plaintif2, menyuruhkan Defendan2 menuliskan "Surat tersebut" kepada "Peguam tersebut" walaupun Defendan1 tidak mendepositkan Jumlah Ditahan dengannya.

g) Defendan2 tidaklah menerima apa2 "bayaran/kos Peguaman" dari Defendant,

h) Apa2 pembayaran baki harga pembelian adalah tidak dibayarkan melalui A/C Defendan2.

i) Defendan1 langsunglah membuat baki harga pembelian kepada Plaintif2.

Oleh yang demikian, Defendan2 menafikan perenggan 21 Penyataan Tuntutan.

37. Plaintif2 tidak menerima harga belian penuh bagi perjualan Hartanah tersebut kerana bertahun-tahun Plaintif2 dan/atau "Peguam tersebut" tidak minta balik harga belian penuh itu daripada defendan-defendan.

38. Plaintif2 dan/atau "Peguam tersebut" tidak minta balik harga belian penuh itu kerana mereka tahu tidak ada harga belian penuh didepositkan dengan Defendan (*sic*) 2.

39. Jikalau Defendan1 ada baki harga belian penuh itu tidaklah perlu Plaintif2 dan Defendan1 mengarahkan Defendan2 menuliskan "Surat tersebut" itu kepada "Peguam tersebut".

40. Oleh yang demikian kerugian dan kerosakan (yang dinafikan) yang dialami Plaintif2 adalah diakibatkan dari cuaian Plaintif2 dan/atau "Peguam tersebut", khususnya Defendan1 gagal membayarkan baki harga pembelian kepada Plaintif2.

41. Dan Defendan2 mengatakan dengan tegas ("categorically") bahawa Plaintif2 tidak patut (tidak berhak) menuntut baki harga belian terhadap Defendan2 oleh sebab yang berikut:

    i) Defendan2 tiada "Privity of Contract" dengan Plaintif2.

    ii) Defendan2 tidak berhutang "Tugas Peduli" ("Duty of Care") kepada Plaintif2.

    iii) Defendan2 berhutang "Tugas Peduli" kepada Defendan1 sahaja dan bukan kepada Plaintif2.

    iv) Jikalau Defendan1 gagal, cuai, enggan atau menafikan membayarkan harga belian penuh kepada Plaintif2, Plaintif2 adalah "Remedy" dibawah undang2, iaitu "Damages for breach of Contract" terhadap Defendan1.

42. "Peguam tersebut" telah memfitnahkan Defendan2 oleh sebab perenggan 20 Penyataan Tuntutan. Kecuali sebagaimana yang diakui dengan nyata dan jelas terdahulu daripada itu, Defendan2 menafikan setiap dan tiap2 pengataan fakta yang terkandung dalam Pernyataan Tuntutan itu seolah oleh ia dinyatakan didalam Pernyataan Pembelaan ini dan sangkal dengan khususnya. Oleh sebab itu, Defendan2 dengan rendah2 meminta ("Prays") Yang Arif:

    (a) tuntutan Plaintif2 terhadap Defendan ditolak;

    (b) gantirugi/janji gantirugi daripada Plaintif2, "JTLH" dan atau "FTK;

    c) gantirugi/janji gantirugi ("indemnity") daripada Defendan1 dan atau Plaintif2;

    d) gantirugi terhadap "Peguam tersebut" bagi fitnah (Defamation);

    e) kos sebanyak RM200,000.00 ...

[29] We need not reproduce the appellants' reply to the respondent's defence. It suffices to say the appellants did not agree.

[30] For the trial at the High Court, the statement of agreed facts between the appellants and the respondent included, *inter alia*, the following:

4. The Plaintiffs at the request of the 1st Defendant by letter dated 17-9-1997 from the 2nd Defendant to the Plaintiffs agreed that the 1st and 2nd Defendants would retain the Retention Sum for the payment of Real Property Gains Tax.

5. The 2nd Defendant by letter dated 5-11-1997 informed and/or represented to the Plaintiffs that the Retention Sum was paid by the 1st Defendant to the 2nd Defendant and the said sum was placed in an interest bearing account.

A

6. Thereafter the 2nd Defendant informed and/or represented to the Plaintiffs that the said Retention Sum was not deposited with the 2nd Defendant.

7. The Plaintiffs have not received the Retention Sum for the payments of Real Property Gains Tax In the sum of RM4,148,836-56.

B

[31] The submissions for the respondent before the High Court were as follows:

1. The plaintiffs have sold their properties (hereinafter referred to as "the Properties") to the first defendant and have been paid the full purchase price but for RM4,148,836.28 (hereinafter referred to as "the Retention Sum") left unpaid.

C

2. The plaintiffs' claim against the second defendant is for the release of the Retention Sum mentioned in para. 1 hereinabove.

3. The basis of the plaintiffs' claim against the second defendant is because the second defendant is the stakeholder of "the Retention Sum".

D

4. The second defendant's defence, however, is that the first defendant did not deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

E

5. There is no evidence at all to show that the first defendant had deposited "the Retention Sum" with the second defendant to pay to the plaintiffs.

6. Because it was agreed by the plaintiffs that "the Retention Sum" is to be held by the second defendant and/or the first defendant, the first defendant did not deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

F

7. If "the Retention Sum" could be held by the first defendant, it makes no sense for the first defendant to deposit "the Retention Sum" with the second defendant and that explains why the first defendant did not deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

G

8. In the first instance, the first defendant did not have "the Retention Sum" to deposit with the second defendant to pay to the plaintiffs for, if the first defendant did have "the Retention Sum" they would have paid it to the plaintiffs or the plaintiffs' solicitors.

H

9. By reason of paras. 6, 7 and in particular para. 8 above, the first defendant could not come out with the cheques or bank drafts to prove they did deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

I

10. Not having "the Retention Sum" to deposit with the second defendant, the first defendant requested the plaintiffs to agree that "the Retention Sum" be held by the second defendant and/or the first defendant.

11. When the plaintiffs agreed that "the Retention Sum" be held by the second defendant, the first defendant, although not having "the Retention Sum" to deposit with the second defendant, immediately on the same day, instructed the defendant to write the letter dated 5 November 1997 (hereinafter referred to as "the said letter") in reply and confirm that "the first defendant did deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

12. By reason of the above, the second defendant's testimony in the witness box that the first defendant did not deposit "the Retention Sum" with him is credible.

13. As regards the plaintiffs' alternative claim against and fraudulent misrepresentation, the second defendant's defence is that:

    (i) The misrepresentation was not fraudulent as both the vendors ("the Plaintiffs") and the purchasers ("first defendant") knew all along that the first defendant did not deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

    (ii) To both the vendors and the purchasers, the truth or lie of "the said letter" is irrelevant. What both of them only wanted was someone to come out with "the said letter" to Malaysian Building Society Bhd to release the loan.

    (iii) The alleged misrepresentation did not cause the loss of "the Retention Sum" to the plaintiffs.

    (iv) The loss of "the Retention Sum" to the plaintiffs was caused by the first defendant not having "the Retention Sum" and depositing it with the second defendant to pay to the plaintiffs.

IN CONCLUSION, the second defendant humbly submit as follows:

(i) The first defendant did not deposit "the Retention Sum" with the second defendant to pay to the plaintiffs.

(ii) By reason of para. (i) above, the second defendant does not have "the Retention Sum" to pay to the plaintiffs.

(iii) The plaintiffs' alternative claim against the second defendant must be dismissed because the loss of "the Retention Sum" was caused not by the second defendant's misrepresentation but by the first defendant not having "the Retention Sum" and depositing it with the second defendant to pay to the plaintiffs. Wherefore, the second defendant representing himself prays that the claims of the plaintiffs against the second defendant be dismissed with costs.

[32] Mr Louis Wong Kok Heng began his submissions before us as follows:

1. The Appellants' claim against the Respondent is for "the retention sum" of RM4,140,836.56 which the Respondent by the said letter informed the Appellants that it had been deposited with the Respondent by the 1st Defendant [Yeng Chong Realty Berhad] for the Appellants.

2. Alternatively, the Appellants' claim against the Respondent for loss and damage for misrepresentation.

A

3. By reason of paragraphs 1 and 2 above. My Lord, the Respondent humbly submit that the Appellants' Appeal be dismissed because it is the alternative claim that the Appellants are appealing against. By claiming in the alternative, the Appellants meant to claim as follows:

> If unsuccessful then we claim for Damages for Misrepresentation. The Cambridge Dictionary defines the word "alternatively" as "we could go to the Indian Restaurant or alternatively (or instead of) we could try that new Italian Place". The Appellants have gone to the Indian Restaurant and succeeded in claiming "the said Retention Sum" and the loss and damage sums of RM414,883.66.

B

C

[33] Upon examination, we found that:

(a) the notice of appeal stated clearly that plaintiffs were not satisfied with the decision of the High Court made on 30 March 2012 in respect of the second defendant and appealed against the whole of the decision dismissing their claim against the second defendant;

D

(b) and if there was any doubt, the memorandum of appeal made it clear it was an appeal against the dismissal of the claim or the alternative claim;

(c) the statement of claim clearly pleaded that there is an alternative claim damages for misrepresentation against the respondent herein; and

E

(d) in opening the oral submissions, counsel for the appellants clearly stated the appeal is in respect of the alternative claim for misrepresentation that was dismissed by the High Court.

[34] Thus, the issue before this court is that when the appellants' claim against the first defendant and respondent succeeded in part, whether the alternative claim by the appellants against the respondent can be pursued.

F

[35] In our view, the submission above for the respondent, using the example of the Indian Restaurant or the new Italian Place and that the appellants had gone to the Indian Restaurant and succeeded in claiming the retention sum and the loss and damage sums of RM414,883.66, obfuscates or confuses the fact that the claim for misrepresentation is a separate cause of action for which a claim was made for general damages to be assessed but no claim is made for specific losses that the respondent referred to. The submission failed to address and defend the reasoning by the High Court as contained in paras. 21 to 24 of the grounds of decision where the High Court failed to address its mind to this very same point. The High Court foundered on the reasoning that "the plaintiff cannot have their cake and eat it as well" when it overlooked the fact the alternative claim for misrepresentation is a separate cause of action, seeking not the specific damages in the claim for the retention sum but for general damages for misrepresentation to be assessed. In other words, it was not the same piece of cake that the saying refers to.

G

H

I

[36] We hold that in overlooking this fundamental fact, the High Court erred. On the face of it, it affected the merits. We continue to consider the submissions to determine if there are grounds for holding that it did not after all affect the merits.

[37] The submission for the respondent then continued:

> 4. The Appellants have not adduce evidence that "the said letter" is a mispresentations. It was just a letter to third person, (Malaysia Building Society Berhad) a financial institution, to release the loan for the purchase of the said properties.
>
> 5. The Appellants did not rely on "the said letter" for the sale of the Properties to the 1st Defendant [Yeng Chong Realty Berhad] as the sales of the said properties were completed before the issue of "the said letter" and the Appellants have received the loan sum for the sale of the said properties.
>
> 6. "The said letter" was not the cause of the loss and damage (if any, which is denied), the cause of the loss and damage was because the Appellants agreed "the Retention Sum" to be held by the 1st Defendant [Yeng Chong Realty Berhad] and/or the Respondent.
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> 7. "The said letter" was an innocent letter, which the 1st Defendant [Yeng Chong Realty Berhad] instructed the Respondent ["1st Defendant's Solicitors"] to facilitate Malaysia Building Society Berhad for the release of the loan.
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> 8. The Appellant humbly pray that this Honourable Court has no choice but to dismiss the Appellants' Appeal because one just cannot fault Justice Lau Bee Lan's wise, fair and knowledgeable decision when she decided that "Tuntutan Plaintif-Plaintif terhadap Defendan Kedua dan juga tuntutan alternative Plaintif-Plaintif terhadap Defendan Kedua ditolak dan kos dibayar oleh Plaintif-Plaintif kepada Defendan Kedua, jika tidak dipersetujui kos perlu ditaksirkan.

[38] The letter that is the basis of the appellants' claim for misrepresentation is not the letter dated 6 November 1997 by the respondent to Messrs KC Yap Kamaludin & Partners, the solicitors for Malaysian Building Society Berhad, but the respondent's letter dated 5 November 1997 to the appellants' solicitors referred to in our para. [25] (d) above received about midday. It was issued following a telephone conversation in the morning which was followed up the same day by the appellants' solicitors to place the terms on record as evidenced by their letter dated 5 November 1997. The letter of 6 November 1997 to Messrs KC Yap Kamaludin & Partners was copied to the first defendant but not to the appellants' solicitors. There was the further letter from the appellants' solicitors dated 5 November 1997 referred to at our para. [25] (e). Thus, the evidence does not support the submission for the respondent that this was a joint effort between the first defendant and the appellants to cause Malaysian Building Society Berhad to proceed with releasing the loan. Clearly, the appellants were particularly

A concerned that the retention sum was deposited as they would face a real property gains tax. The respondent's explanation to the appellants that it acted on the instructions of the first defendant came only by the respondents' letter on 23 October 2002, long after the event in 1997, and the first request on 6 February 1998 for the release of the retention sum to pay the real B property gains tax assessed and due on or before 24 February 1998. If it were true, one would expect it to be made then, not only on 23 October 2002.

[39] The respondent had replied on 11 February 1998 that it was instructed by the first defendant to say that the assessment was premature as the sale and purchase agreement has not been completed in view of the fact that the C title to the said land had not been issued by the relevant Land Office. Once the assessment was issued, it was not for the appellants' solicitors let alone the respondent to say when it should be paid. More to the point, it diverted attention from the fact the respondent failed to disclose to the appellants' solicitors that the first defendant had failed to deposit the retention sum in D the first place.

[40] The submission also flew in the face of the finding of the High Court that the retention sum was part of the purchase price and until it is paid there was no completion of the sale and purchase transaction between the first defendant and the appellants. More to the point, it is obvious that if the E retention sum is not deposited, the appellants face paying the assessment of real property gains tax out of their pocket. We note there is nothing pleaded how and when the first defendant would repay the real property gains tax to the appellants.

[41] We find nothing in the above to support the view the error of the High F Court did not affect the merit.

[42] The submission for the respondent continued as follows:

> 9. "*Argumentum ad Hominem*". Both the first defendant's Solicitors [Yeng Chong Realty Berhad] and the appellants' solicitors were G present before Justice Lau Bee Lan in chambers when the respondent requested that the appellants' solicitors to withdraw their claim against the respondent for otherwise the respondent would admit that the first defendant (Yeng Chong Realty Berhd) did deposit the Retention Sum with respondent [the first defendant (Yeng Chong Realty Berhad) would then go scot free]. The H appellants objected but the first defendant (Yeng Chong Realty Berhad) argued that there is no law that the respondent cannot admit that the first defendant; Yeng Chong Realty Berhad did deposit "the Retention Sum" with the respondent, thereby cancelling the "lie" alleged and "put it to the respondent" when crossed-examined by the first defendant (Yeng Chong Realty I Berhad). On the one hand, the first defendant [Yeng Chong Realty Berhad] did deposit the said Retention Sum with the respondent and on the other hand the appellants are now appealing against the decision of Justice Lau Bee Lan in striking out their alternative

claim against the respondent in that the respondent has stated in the said letter that the first defendant [Yeng Chong Realty Berhad] has deposited the Retention Sum with the respondent. If the respondent had admitted before Justice Lau Bee Lan that the first defendant [Yeng Chong Realty Berhad] has deposited "the Retention Sum" with the respondent, the appellants could not succeed misrepresentation then) and the respondent would be telling another lie before Justice Lau Bee Lan and the respondent's police report would be a false report. There are therefore as it were two "lies" here, ie, "the said letter" and the one before Justice Lau Bee Lan and therefore the appellants should appeal against the whole of the Judgement of Justice Lau Bee Lan for Justice Lau Bee Lan was misled, as it were, by "lies" to come to her judgement.

10. Furthermore, if the said letter was a "lie", the second letter dated 23 October 2002 is or could also be a "lie". Why then the appellants believe the first letter was a "lie" and the second letter was the truth? The answer is because of accepting that the first letter was a "lie" they could try to go for the alternative claim (against which they are appealing) for damages for Mispresentation. By accepting the second letter as the truth they succeeded in claiming for "the Retention Sum" from the first defendant [Yeng Chong Realty Berhad].

11. By reason of the above and in all the circumstance of the case, the respondent humbly submit and pray that this appeal before Yang Amat Arif-Arif be dismissed with costs of RM5,000 each from the four appellants."

[43] The Latin term "*Argumentum ad Hominem*" refers to the common mistake of relying upon the fallacy of attacking the character and circumstances of an argument or of the individuals doing so with a personal attack, instead of addressing the facts and evidence for example to disprove the truth of the statement or the soundness of the argument, where in the end the truth or fallacy of the original argument is overlooked and the attack on the character and circumstances of the argument is used to influence opinion.

[44] Having brought the cannon of "*Argumentum ad Hominem*" to bear, the submission deflated itself since brought before the trial judge in chambers related to how to deal with the two different versions of the first defendant and the respondent. The trial could be simplified if the first defendant and the respondent could come to some agreement, but if no agreement was reached the two versions would be dealt with at the trial. We find no *argumentum ad hominem* on the part of the appellants.

[45] With respect, High Court overlooked the fact that the respondent had acted on the instructions of the first defendant, and that the first defendant was extended a copy of the letters by the respondent, pertains to the issue between the first defendant and the respondent. The respondent replied on 6 November 1997 to Messrs KC Yap Kamaludin & Partners to use the sum of RM4,148,836.28 then presently deposited with the respondent to make up

A the difference, copied to his client, but not the appellants' solicitors to whom it had made the representations the day before showed close involvement with the first defendant in utter disregard to its own representations to the appellants' solicitors the day before.

B **[46]** Be that as it may, it is certainly not an answer to the appellants' claim against the respondent for misrepresentation since the evidence shows that while the respondent did not receive the retention sum on 22 September 1997 or even 5 November 1997, the respondent had:

(a) in a telephone conversation in the morning of 5 November 1997 (see para. [9] above), informed the appellants' solicitors that matters the appellants solicitors sought to record in writing by their letter of 5 November 1997; and

(b) by his letter of 5 November 1997 (see para. [10] above) represented to the appellants' solicitors that his client the first defendant had deposited the sum of RM14,800,351.36 with him and that the first defendant had done so on 22 September 1997, that the sum of RM14,800,351.36 being the balance between the purchase price and the loan sum. It means that is the portion of the purchase price payable directly by the first defendant. Hence the explanation that out of that sum, the amount of RM4,148,836.28 has been set aside as retention for the payment of real property gains tax (see RR7:1347).

[47] Accordingly, we allow the appeal, and enter judgment for the appellants as claimed at prayer (6) for damages to be assessed for misrepresentation, with interest at the rate of 4% from the date of the writ of summons to the date of judgment, and 4% from the date of judgment to date of full settlement, with costs in High Court to be assessed unless otherwise agreed. Costs here RM10,000 unless otherwise agreed. Deposit refunded.